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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Alpine)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID WESLEY CARLILE,

Defendant and Appellant.

C074991

(Super. Ct. No. 96F01396)

Defendant David Wesley Carlile appeals from the trial court's order denying his petition for resentencing pursuant to Penal Code section 1170.126.<sup>1</sup> He challenges the trial court's finding--made without briefing, hearing, or trial--that his prior conviction for kidnapping was a sexually violent offense as defined in Welfare and Institutions Code section 6600, subdivision (b).

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

We agree only with defendant's argument that he was entitled to brief the trial court on the proposed classification of his kidnapping conviction as sexually violent before it rendered its decision. However, because the trial court's error was harmless beyond a reasonable doubt on the specific facts of this record, we shall affirm.

### **BACKGROUND**

In 1996 defendant pleaded guilty to possession of methamphetamine for sale (Health & Saf. Code, § 11378) and admitted two prior strikes. He was sentenced to 25 years to life in prison. We affirmed his conviction in 1997.

Defendant had prior convictions for kidnapping (§ 207), assault by means likely to produce great bodily injury (§ 245, subd. (a)), attempted forcible rape (§§ 664, 261), and attempted forcible oral copulation (§§ 664, 288a) with great bodily injury enhancements (§ 12022.7) as to all the crimes. Our 1983 opinion affirming his convictions by jury for these crimes detailed defendant's actions in relevant part as follows.

Shortly after 2:00 a.m. on November 9, 1980, defendant and Wesley Washington were returning from a party in a car driven by Arthur Simpson. The 19-year-old victim had just left a different gathering and was standing on the side of the road. At defendant's suggestion, Simpson stopped the car near the victim. Washington, who was riding in the front seat, got out and offered the victim a ride. The victim was equivocal, so Simpson and the others drove off. Twenty or thirty yards down the road, defendant became agitated and insisted on returning for the victim and soliciting her for multiple sex acts. Simpson then drove back to where the victim was conversing with a male friend.

Washington tried to coax the victim into the car, promising her a ride. When she refused, defendant threw her into the back seat. As Simpson drove away, defendant began to beat the victim, telling her to "shut up, sit still," while intermittently giving Simpson directions on where to drive. Washington told defendant to "[s]hut that bitch up." The victim was moaning and struggling. Simpson could hear "fist-to-face" blows

emanating from the back seat; there were about 40 such blows during the ride. Blood from the victim was later found smeared on the back seat, deck, windows, and on the backside of the front seat. Defendant's hands were bruised and there were cuts on his knuckles when he was arrested a week later.

Following directions from defendant and Washington, Simpson stopped the car in a remote area. Defendant and Washington removed the victim from the car and took her down a hillside near a pasture. Simpson parked the car and returned to where he could see defendant and Washington with the victim. He saw defendant kneeling over the victim's head and heard defendant command her to orally copulate him. At the same time, Simpson saw Washington facing defendant over the victim's body and "rustling around" on the ground.

Defendant later asked Simpson whether he wanted to have sex with the victim; Simpson declined. Simpson saw defendant hitting the victim again before he and Washington picked up defendant and drove away, leaving her there.

The victim was discovered the next morning by boys who heard her moans. She sustained a cerebral concussion, multiple abrasions, and lacerations on her arms, shoulders and legs, genital bruising, nasal fractures and a "blow out" fracture of the bone under her left eye. Surgery was required to repair the facial fractures; the procedure was risky because of the proximity of the optic nerve. The surgeon testified that the victim very easily could have been blinded in the left eye and would have a permanent scar under her eye from that laceration.

In September 2013, defendant filed a petition for resentencing pursuant to section 1170.126. The petition asserted that none of defendant's prior convictions rendered him ineligible for resentencing. Defendant specifically noted that none of his offenses qualified as sexually violent offenses under Welfare and Institutions Code section 6600, as that classification did not encompass *attempted* rape and *attempted* oral copulation by force. The petition did not specifically discuss his kidnapping conviction.

The trial court denied the petition in a written opinion without ordering briefing or holding a hearing. Relying on the facts of the prior convictions as set forth in our 1983 opinion, as summarized *ante*, the trial court found beyond a reasonable doubt that the prior kidnapping conviction was committed with force and the intent to commit sex crimes as listed in Welfare and Institutions Code section 6600, subdivision (b), rendering it a sexually violent offense and rendering defendant ineligible for resentencing.

## DISCUSSION

### I

#### *Due Process*

##### *A. Section 1170.126 and Sexually Violent Offenses*

Section 1170.126 allows defendants serving a life term for a third strike to petition for resentencing. (§ 1170.126, subd. (b).) Eligibility for resentencing is initially limited to defendants serving life terms for felonies that are neither serious nor violent. (§ 1170.126, subd. (e)(1).) Other factors can render a defendant ineligible for resentencing. One of the disqualifying factors, as cross-referenced in section 1170.126, subdivision (e)(3), is having a prior conviction for a sexually violent offense. (§§ 667, subd. (e)(2)(c)(iv)(I), 1170.12, subd. (c)(2)(C)(iv)(I).)

The term “sexually violent offense” is defined in Welfare and Institutions Code section 6600, subdivision (b) as, “the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 of the Penal Code, *or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code.*” (Welf. & Inst. Code, § 6600, subd. (b), italics added.)

As we have described, defendant was convicted of kidnapping (§ 207) as well as attempted forcible rape (§§ 664, 261), and attempted forcible oral copulation (§§ 664, 288a) for the conduct that we have described *ante*. Thus if defendant kidnapped the victim with force and the *intent* to commit forcible rape or oral copulation, the kidnapping conviction would be defined as a sexually violent offense under the relevant statute and disqualify defendant from eligibility for resentencing pursuant to section 1170.126.

*B. Opportunity to be Heard*

Defendant contends the trial court violated his due process rights by relying on “extra facts” beyond the elements of the relevant offenses to determine that his prior conviction for kidnapping was a sexually violent offense, without affording him “notice of the basis for possible disqualification, an opportunity to address the relevant factors, and consideration of the entire record of conviction.”

We recently addressed the process that should be afforded to the petitioning defendant at the eligibility determination stage of a section 1170.126 proceeding. In *People v. Bradford* (2014) 227 Cal.App.4th 1322 (*Bradford*), we held that neither section 1170.126 nor due process requires the trial court to hold a *formal* hearing before determining whether a defendant is eligible for resentencing. (*Bradford*, at pp. 1337, 1341.) However, we added that “the trial court must be careful to avoid making a precipitous decision without input from the parties.” (*Id.* at p. 1340.) “[I]f the petitioner has not addressed the issue and the matter of eligibility concerns facts that were not actually adjudicated at the time of the petitioner’s original conviction . . . , the trial court should invite further briefing by the parties before finding the petitioner ineligible for resentencing.” (*Id.* at p. 1341.)

Here, the trial court found defendant ineligible based on facts not adjudicated in defendant’s current conviction and not specifically briefed in his petition. Under *Bradford*, the trial court erred when it failed to allow defendant to brief the issue of

whether his prior conviction for *kidnapping* was a sexually violent offense that rendered him ineligible for resentencing due to his intent at the time he kidnapped the victim.

*C. Harmless Error*

Failure to solicit additional briefing as required under *Bradford* is subject to analysis for harmless error, although the error must be harmless beyond a reasonable doubt. (*People v. Oehmigen* (2014) 232 Cal.App.4th 1, 8 (*Oehmigen*); *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed. 705, 710-711].) This error is harmless where: “The facts in the record are undisputed, and [defendant] *presently* has an advocate to challenge the *legal* bases of the trial court’s ruling in *this* court. Any legal error in the trial court is therefore no more prejudicial on appeal than legal error on undisputed facts in a motion for summary judgment.” (*Oehmigen*, at p. 8.)

Defendant does not dispute the facts of his prior offenses as they are set forth in our 1983 opinion and in this opinion. Instead, he argues deprivation of due process. He argues (correctly) that he was entitled to address “what facts are part of the record of conviction and whether the facts support the [sexually violent offense classification],” but he does not and cannot argue that his eligibility is a question of fact that requires the resolution of disputed issues. (See *Oehmigen, supra*, 232 Cal.App.4th at p. 7 [“[E]ligibility is *not* a question of fact that requires the resolution of disputed issues”].)

As we discuss briefly *post*, our prior opinion--on which the trial court relied--*is* part of the record of conviction, and the trial court did not err when it considered the facts set forth therein to determine defendant’s eligibility. As we also discuss *post*, defendant had no right to further “adversarial testing” of these details of his crimes in the context of his section 1170.126 petition (which we interpret as an argument for a jury trial on the disqualifying facts of his convictions).

The facts surrounding defendant’s kidnapping conviction, as recited in our prior opinion, conclusively establish that defendant kidnapped the victim with force and with the intent to commit forcible rape or oral copulation. The jury *convicted* him of

attempted forcible rape and oral copulation in the course of the kidnapping; there is no dispute over whether any of these crimes were committed and under what circumstances. Thus defendant's kidnapping conviction is properly defined as a sexually violent offense. Indeed, when affirming defendant's convictions in 1983, we held that section 654 prevented defendant's sentencing for both the kidnapping and the sex crimes because the kidnapping was committed *with an intent to abduct for sexual purposes*. In light of the indisputable evidence that the kidnapping was a sexually violent offense, the error in failing to permit briefing on this issue is harmless beyond a reasonable doubt.

*D. Reliance on Appellate Opinion*

Defendant suggests improper reliance by the trial court on our 1983 opinion. We have recently clarified that reliance on the appellate opinion to determine facts surrounding defendant's crimes of conviction is appropriate in this context, noting that if the opinion is not true to the record on appeal a party may petition for rehearing. (*People v. Guilford* (2014) 228 Cal.App. 4th 651, 660-661 [upholding trial court's reliance on facts outlined in appellate opinion to find intent to inflict great bodily injury in the defendant's (current) conviction for spousal abuse].) We see no reason why the same analysis should not apply to use of the appellate opinion related to a *prior* conviction to determine the facts surrounding that prior. (See *People v. Manning* (2014) 226 Cal. App. 4th 1133, 1141 [California courts have routinely determined that prior convictions constitute serious or violent felonies by looking to the nature and circumstances of the underlying conduct].)

We add that in this case, unlike the defendants in *Guilford* and *Manning*, defendant was *convicted* of attempting to commit the relevant sex crimes as well as the kidnapping; the only determination the trial court made from the appellate opinion was that defendant *intended* to commit the sex crimes--which he was convicted by jury of attempting--*at the time of the kidnapping*. No error appears in the trial court's use of the appellate opinion to make that determination.

## II

### *Jury Trial*

Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] and *Descamps v. United States* (2013) 570 U.S. \_\_\_\_ [186 L.Ed.2d 438] (*Descamps*), defendant contends he is entitled to a jury trial and the proof beyond a reasonable doubt on the issue of whether his prior kidnapping conviction was sexually violent. We disagree.

We recently rejected this argument, finding it based on the mistaken premise that the two strikes sentence is now the presumptive sentence. “Reducing the sentence of an individual like the current petitioner, who is serving a valid sentence imposed more than a decade ago, is not constitutionally compelled . . . . [T] he trial court’s determination of facts that affect whether the defendant will be resentenced does not implicate the right to a jury trial as described in the *Apprendi* cases.” (*Bradford, supra*, 227 Cal.App.4th at p. 1336; see also *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1302-1303 [*Apprendi* does not apply to dangerousness finding under section 1170.126 as two strikes sentence is not the presumed sentence].)

The Supreme Court’s decision in *Descamps* does not change the analysis. In *Descamps*, the Supreme Court held that a finding under the Armed Career Criminal Act that a prior conviction was for “a violent felony” may not be based on facts underlying the prior conviction when the elements of the prior conviction were broader than the elements of that crime as commonly understood. (*Descamps, supra*, 570 U.S. at p. \_\_\_\_ [186 L.Ed.2d at pp. 449-450].) While this holding may affect sentence-enhancing provisions (see *People v. Wilson* (2013) 219 Cal.App.4th 500, 515 [“[I]n *Descamps*, a majority of the United States Supreme Court held that a sentencing court’s finding of priors based on the record of conviction implicates the Sixth Amendment under *Apprendi*”]), it has no effect on *Apprendi*’s application to section 1170.126 “because, as

an ameliorative provision, section 1170.126 can only decrease a defendant's sentence.”  
(*People v. Manning, supra*, 226 Cal.App.4th at p. 1141, fn. 3.)

Since section 1170.126 decreases rather than increases the standard punishment for a crime, neither *Apprendi* nor *Descamps* affects the ability of a trial court to make the requisite findings under that statute. Defendant's claim fails.

**DISPOSITION**

The trial court's orders are affirmed.

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DUARTE, J.

We concur:

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HULL, Acting P. J.

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MAURO, J.